No. 86-688

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAMES G. RICKETTS, et al.,
Petitioners,

VS.

ROBERT WAYNE VICKERS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN P. FRANK
LEWIS & ROCA
First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
(602) 262-5311

CHARLES R. BREYER*
JOSEPH C. SPERO
COBLENTZ, CAHEN, MCCABE & BREYER
Thirty-Fifth Floor
One Embarcadero Center
San Francisco, CA 94111
(415) 391-4800

MARGARET C. CROSBY
ALAN L. SCHLOSSER
EDWARD M. CHEN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
1663 Mission Street
Suite 460
San Francisco, CA 94103
(415) 621-2493
Attorneys for Respondent

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Does the failure to instruct the jury on second degree murder in a capital case violate due process under *Beck v. Alabama*, 447 U.S. 625 (1980) where, under both state and federal law, there was evidence negating premeditation sufficient to permit a jury rationally to render a verdict of second degree murder?

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STATEMENT OF FACTS

Respondent was tried in the Pinal County Superior Court in Arizona for the homicide of his cellmate at Arizona State Prison. In defense, Respondent presented evidence through lay and expert witnesses of his mental instability. As described by Judge Kennedy writing for the Court of Appeals below:

> There was considerable evidence of appellant's abnormal and violent behavior. Appellant testified that he had scars from self-mutilation, and that he had stabbed and shot several people before his incarceration at the Arizona State Prison. There was testimony that prison authorities had repeatedly disciplined appellant for aggressive conduct. Appellant recently had been convicted of stabbing a fellow

inmate, and he regularly carried and used weapons in the prison. Other inmates testified that appellant periodically engaged in bizarre episodes during which he screamed and made animal-like sounds, and punched and beat his head against the walls of his cell. The inmates testified that these episodes erupted spontaneously and for no apparent reason. During these disturbances, appellant was violent and appeared not in control of himself. There was testimony that appellant had a short temper and had spontaneously triggered several fistfights. Two inmates testified they would be reluctant to share a cell with appellant, suggesting they feared his violent outbursts. This testimony is consistent with a sudden act of violence, without premeditation.

Dr. Paul Bindleglas, a psychiatrist who conducted a pretrial mental status examination and testified for the defense, attributed appellant's aggressive behavior to a brain disorder related to an epileptic condition. Dr. Bindleglas testified that appellant's history of epilepsy was well documented, and that appellant had a history of epileptic seizures. Dr. Bindleglas stated that in his opinion an electroencephalogram showed that appellant suffered from a lesion of the left temporal lobe of the brain. He explained that such lesions are known to produce episodes of aggression and can give rise to seizures, and that the temporal lobe is closely related to aggression and hostility. Dr. Bindleglas noted that after medical authorities at the Arizona State Prison terminated appellant's epilepsy medication in 1977, appellant performed acts of self-mutilation and engaged in repeated episodes of impulsive aggression and violence toward others. He opined that appellant's aggressive behavior after his medication was terminated was related to the lesion. Dr. Bindleglas concluded that appellant suffered from a seizure disorder of the left temporal lobe and may have been under the influence of a seizure when he killed Ponciano. According to Dr. Bindleglas, there was a strong possibility that appellant killed Ponciano after waking from his sleep in a state of post-epileptic confusion.

> Dr. Bindleglas' testimony was replete with references to appellant's impulsive behavior. The Arizona Supreme Court has held that the tendency to act on impulse is probative of an absence of premeditation. *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580, 582-83 (1981). Dr. Bindleglas testified on direct examination that the termination of appellant's epilepsy medication precipitated "characteristic impulsive episodes of violence. . . ." He repeated: "These were impulsive episodes of violence." On cross-exmination Dr. Bindleglas reiterated that appellant "became more aggressive and impulsive towards other people" after his medication was terminated. He added that appellant experiences "impulses to his emotion center [that cause] intense feelings of rage and aggression. . . ." In addition, Dr. Bindleglas stated that appellant's "normal personality is one in which there is considerable hostility and aggressiveness," and opined that the killing occurred when appellant was "in a nonalert mind with considerable confusion and without any cerebral inhibitions on his aggressive impulses."

Respondent also testified as to periods when he lost control of his conduct. (Excerpt of Record, 1745-47, 1750)

The state's case against Respondent was based largely on circumstantial evidence: prison guards described the circumstances surrounding the discovery of the victim's death, the autopsy report described the cause of death as strangulation, and two experts stated they did not believe Respondent was legally insane at the time of the homicide. The sole direct evidence of Respondent's mental state at the time of the crime was the testimony of an unlicensed prison psychologist, Kent Spillman, who described a confession allegedly made by Respondent hours after the homicide. Spillman testified that Respondent admitted the killing was "premeditated." Respondent vigorously contested Spillman's testimony at trial, and denied the alleged confession. (Excerpt of Record, 1744-45, 1757, 1766)

The jury was instructed on first degree murder and insanity. The jury was not given the option of second degree murder. After

the jury rendered a verdict of first degree murder, the trial judge sentenced Respondent to death.

On direct appeal, the Arizona Supreme Court recognized the trial court's failure to give the lesser-included offense jury instruction on second degree murder would normally violate due process under *Beck v. Alabama*, 447 U.S. 625 (1980). It found, however, that reversal was not required in this case because "the uncontested facts show the *opportunity* to reflect or premeditate" the killing, and thus there was no evidence to support an instruction on second degree murder. *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315, 322 (1981) (emphasis added).

After exhausting state post-conviction remedies, Respondent filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition challenged the constitutionality of his conviction and death sentence on a number of grounds, including: (1) denial of due process resulting from the trial court's refusal to allow the court-appointed defense psychiatrist to obtain a battery of diagnostic psychological and neurological tests necessary to complete and confirm his evaluation of Respondent's mental disorders; (2) ineffective assistance of court-appointed counsel, a confirmed alcoholic who failed to conduct any meaningful investigation in preparing the defense and who was totally ignorant of rudimentary substantive and procedural laws central to Respondent's defense; and (3) denial of due process because of the trial court's failure to give the jury the option of second degree murder. The District Court denied an evidentiary hearing and dismissed the writ based in part upon an *ex parte* communication. Respondent appealed to the Ninth Circuit.

The panel, per Judge Anthony M. Kennedy, noting that some of Respondent's other contentions "raise substantial questions", unanimously reversed on the basis of the due process violation under *Beck v. Alabama*, 447 U.S. 625 (1980) and *Hopper v. Evans*, 456 U.S. 605 (1982). Petitioners' petition for rehearing was denied. Petitioners did not seek rehearing *en banc*, but instead filed the Petition for Writ of Certiorari herein.

SUMMARY OF ARGUMENT

This case is not appropriate for review by this Court. The Court of Appeals correctly determined that Respondent was entitled to a lesser included offense instruction under *Beck, supra,* and *Hopper, supra.* Contrary to Petitioners' assertions, the federal Due Process and Arizona standards governing when a lesser included offense instruction is required are identical. Therefore, this case does not present the issue of which standard governs federal habeas corpus review of state convictions. Moreover, under any standard, the determination by the Court of Appeals that the unique circumstances of the case required such an instruction is unassailable.

Similarly, this case does not present the issue of what deference, if any, is due to a state court determination on this issue. The Arizona court's ruling that no second degree murder instruction was required is without any support in the trial record, and it applied an unconstitutional presumption. The Arizona court was therefore wrong under any standard. Finally, as a matter governed by federal Due Process standards, no deference to such a determination is required.

REASONS FOR DENYING THE WRIT

I.

FEDERAL AND ARIZONA STANDARDS REGARDING ENTITLEMENT TO A LESSER OFFENSE INSTRUCTION ARE IDENTICAL, AND THE COURT OF APPEALS' DETERMINATION THAT THE JURY SHOULD HAVE BEEN GIVEN THE CHOICE OF A SECOND DEGREE MURDER VERDICT WAS CORRECT UNDER EITHER STANDARD.

Contrary to Petitioners' assertion, the petition herein does not raise any important questions of federalism. It only concerns the correctness of the Court of Appeals' assessment of the trial record in determining whether, under the unique facts of this case, Respondent's federal due process right was violated.

At the outset it should be noted that there is nothing unique or unusual about Arizona law that requires an evaluation of its consistency with the federal constitution. This case does *not* involve a dispute as to the interpretation or constitutionality of state substantive law defining criminal offenses. Petitioners agree that the difference between first and second degree murder under Arizona law is premeditation—*i.e.*, when "the defendant made a decision to kill prior to the act of killing, [and] 'a plan to murder was formed after the matter had been made a subject of deliberation and reflection.' " *State v. Kreps*, 146 Ariz. 446, 706 P.2d 1213, 1216 (1985) (quoting *State v. Lacquey*, 117 Ariz. 231, 571 P.2d 1027, 1030 (1977) (quoting *Macias v. State*, 36 Ariz. 140, 283 P. 711, 715 (1929)). "The essence of premeditation is the reflective intent to kill." *State v. Walton*, 133 Ariz. 282, 650 P.2d 1264, 1271 (Ariz.Ct.App. 1982). Arizona law requiring premeditation as an element of first degree murder is in accord with common law and definitions long established in other jurisdictions. *See United States v. Frady*, 456 U.S. 152, 170-171 n.18 (1982); *Fisher v. United States*, 328 U.S. 463, 469-70 n.3 (1946); W. LaFave & A. Scott, *Criminal Law*, Section 73 (1972).

Nor does this case concern the constitutionality of the standard by which the Arizona courts determine whether there is sufficient evidence to warrant the giving of a lesser offense jury instruction. Petitioners agree that a second degree murder instruction must be given where "the evidence reasonably construed . . . tend[s] to show lack of premeditation." *State v. Moreno*, 128 Ariz. 257, 625 P.2d 320, 324 (1981). "The presence of such evidence is dispositive." *Id. See State v. McIntyre*, 106 Ariz. 439, 477 P.2d 529 (1970); *State v. Sorensen*, 104 Ariz. 503, 455 P.2d 981 (1969); *Singh v. State*, 35 Ariz. 432, 280 P. 672, 677 (1929). This standard is indistinguishable from the federal standard described in *Beck*, *supra*, 447 U.S. at 635 and *Hopper*, *supra*, 456 U.S. at 611-12. The federal rule is that the lesser included offense instruction must be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). Like Arizona law, the instruction must be given if there is "any evidence which tended to show such a state of facts

as might bring the crime within the grade" of the lesser offense. *Stevenson v. United States*, 162 U.S. 313, 314 (1896).

Under both Arizona and federal law, evidence supporting a lesser offense instruction may be established directly or indirectly through inference based on circumstantial evidence. *See United States v. Comer*, 421 F.2d 1149, 1154 (D.C. Cir. 1970); *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981); *State v. Hicks*, 133 Ariz. 64, 649 P.2d 267, 274 (1982). Moreover, under both Arizona and federal law, in determining whether a jury rationally could render a verdict on the lesser offense, the jury is entitled to disbelieve any witness or may choose to disbelieve part of a witness' testimony and draw its own inferences therefrom. *See Stevenson v. United States, supra*, 162 U.S. at 322; *United States v. Comer, supra*, 421 F.2d at 1155; *State v. Ramos*, 108 Ariz. 36, 492 P.2d 697, 699 (1972); *Nevarez v. State*, 22 Ariz. 237, 196 P. 449, 450 (1921); *Singh v. State, supra*, 35 Ariz. 432, 280 P. at 677. "[T]he jury might fairly infer the lesser offense from the evidence presented, 'including a reconstruction of events gained by accepting the testimony of one or more witnesses only in part.' [Citations omitted]" *United States v. Liefer*, 778 F.2d 1236, 1246 (7th Cir. 1985).

A. Because the Arizona standard is identical to the federal rule in every relevant respect, this case does not present the issue Petitioners contend was reserved by this Court in *Hopper*—whether the evidence is sufficient to warrant the giving of a second degree murder instruction in a capital case is measured in the first instance by state or federal law.[1]

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[1] In *Hopper*, this Court compared the Alabama and federal rules. 456 U.S. at 611-12. Under Alabama law, the lesser offense instruction is given if "there is any reasonable theory from the evidence which would support the position." *Hopper, supra*, 456 U.S. at 611, *quoting, Fulghum v. State*, 291 Ala. 71, 75, 277 So.2d 886 (1973). There is no substantive distinction between the Alabama and federal rules. Accordingly, the Court found the Alabama rule did not "offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases." *Id.* Since the rules were substantively identical, it was immaterial to the due process guarantees of *Beck* whether state or federal law applied.

B. Under either Arizona or federal standard, the Court of Appeals' conclusion that the evidence supported a jury instruction on second degree murder was correct. There was an abundance of lay and expert evidence in the trial record as to Respondent's impulsive behavior and sudden outbursts of violence, all of which tended to negate premeditation. Although there was evidence which would have supported a finding of premeditation, it simply cannot be said that a rational jury, deciding for itself questions of credibility and drawing inferences it deemed probable, could not have reached a verdict of second degree murder.

The Court of Appeals, per Judge Kennedy, properly found:

> The evidence of impulsive aggression and Dr. Bindleglas' testimony attributing appellant's conduct to an epileptic disorder might not have been persuasive to a jury, but if it were, it would allow a rational conclusion that the killing was not premeditated. The jury might have rejected the conclusion that appellant was insane but nevertheless credited the testimony to the extent it suggested appellant acted on impulse. A jury reasonably could find that appellant was under the influence of an epileptic episode when he killed

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If, however, a state rule imposed a barrier to a lesser offense instruction which was more stringent than the federal rule, there would be a reason not to apply the less protective state standard. While a state is free to define the elements of a crime, once it does, due process requires the state to prove each element beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197, 210, 215 (1977). Where, as in Arizona and most other jurisdictions, premeditation is the substantive element of first degree murder which distinguishes it from second degree murder, the state is required by due process to prove premeditation beyond a reasonable doubt. *See State v. Lacquey*, *supra*, 117 Ariz. 231, 571 P.2d at 1029-30. Thus due process requires the giving of a lesser-included offense instruction if the defendant produces evidence which a rational jury could find raises a reasonable doubt as to premeditation. The imposition of a "super barrier" to the giving of the lesser offense instruction would be inconsistent with *Mullaney* and *Hopper*. Since Alabama law did not present such a barrier, this Court was not required to address this issue in *Hopper*. Similarly, because the Arizona standard is indistinguishable from the federal rule, the issue is not presented in this case.

Ponciano and that the disorder impaired his ability to reflect.[2]

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[2] Contrary to Petitioners' contention, Respondent's primary defense of insanity did not preclude an instruction on second degree murder. The Arizona Supreme Court on direct appeal made no such finding; it only ruled that if Respondent were sane, the circumstances of the crime were such that it must have been premeditated. 633 P.2d at 322. The nature of Respondent's mental disorder as described at trial was not inherently inconsistent with a finding of second degree murder, because the severity and effect of the disorder were matters of degree, presenting a continuum of varying impairment to consciousness, volition, and judgment. Indeed, since Arizona has adopted the narrow M'Naughten rule of insanity requiring a defect of reason from disease of the mind so as not to know the nature and quality of the act or that what he was doing was wrong (*State v. Doyle*, 117 Ariz. 349, 572 P.2d 1187, 1189 (1977)), there is substantial room for the jury to decide between the polar extremes of legal insanity and premeditated murder. Here, for example, the jury could have concluded that Respondent was legally sane in that he was aware of the nature of his conduct, and yet was sufficiently impaired so that he could not control his impulse.

State v. Schroeder, 95 Ariz. 255, 389 P.2d 255 (1964), *cert. denied*, 379 U.S. 939 (1964) cited by Petitioners does not hold to the contrary. *Schroeder* merely held that where the state of the evidence is such that the "defendant can only be guilty of the crime charged or not guilty at all," a lesser offense instruction need not be given. The defendant's alibi in *Schroeder* is one such example. Although some insanity theories may be utterly inconsistent with a lesser offense, as where the defendant admits to premeditation but contends that as a result of paranoid schizophrenia he believed he was morally right, not all insanity theories are inconsistent with second degree murder.

Accordingly, in *State v. Harwood*, 110 Ariz. 375, 519 P.2d 177, 182 (1974), the Arizona Supreme Court distinguished *Schroeder* in reversing a murder conviction. Although the defendant asserted an insanity defense, the court held that the trial court was required to give a jury instruction on the lesser offense of manslaughter.

II.

THIS IS NOT A PROPER CASE TO DETERMINE THE MEASURE OF DEFERENCE, IF ANY, WHICH IS DUE TO THE STATE COURT'S DETERMINATION THAT A LESSER OFFENSE INSTRUCTION WAS NOT WARRANTED BY THE EVIDENCE: UNDER ANY MEASURE THAT DETERMINATION WAS CLEARLY WRONG.

Petitioners fault the Court of Appeals' decision because of its alleged failure to afford the Arizona Supreme Court's conclusion a "presumption of correctness." But the Court of Appeals' careful assessment of the trial record in finding sufficient evidence to warrant a second degree murder instruction did not offend any applicable presumption of correctness for two reasons. First, no such presumption is due because that determination is a matter of federal constitutional law, not historical facts. Second, even if such a presumption were due, any such presumption was overcome in this case.

A. Whether sufficiency of evidence is to be measured in the first instance against state or federal standard, the ultimate determination as to whether due process is violated under *Beck v. Alabama* is a question of federal constitutional law determinable by the federal courts. *Cf. Jackson v. Virginia*, 443 U.S. 307 (1979) (due process requires federal habeas court to determine whether there is sufficient evidence to permit any rational trier of the fact to find guilt of crime beyond a reasonable doubt); *Thompson v. Louisville*, 362 U.S. 199 (1960) (state court conviction violates due process where there is no evidence supporting conviction). Thus, in *Hopper v. Evans*, this Court, rather than requiring remand to the Alabama courts, *itself* reviewed the trial evidence in determining there was not sufficient evidence to warrant a lesser offense instruction. 456 U.S. at 612-13.

Moreover, as this Court recently noted in *Rose v. Clark*, 478 U.S. ____, 106 S.Ct. 3101, 92 L.Ed.2d 460, 469-470 (1986), the question as to whether the trial evidence warranted a lesser-included offense instruction under *Beck* and *Hopper* may be characterized as a species of harmless error analysis. In *Rose*, this Court enumerated various contexts in which the harmless error

test of *Chapman v. California*, 386 U.S. 18 (1967) has been applied. The Court referred to *Hopper v. Evans* as a case "citing *Chapman*, and finding no prejudice from trial court's failure to give lesser-included offense instruction." 92 L.Ed.2d at 470. Harmless error under *Chapman* is, of course, a question of federal law reviewable by the federal courts. *Chapman v. California*, *supra*, 386 U.S. at 21; *Fontaine v. California*, 390 U.S. 593 (1968); *Fahy v. Connecticut*, 375 U.S. 85 (1963); *Connecticut v. Johnson*, 460 U.S. 73, 81 n.9 (1983).[3]

The propriety of federal review in this instance is not only necessitated by the fact that harmless error evaluation is inextri-

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[3] Independent federal review of sufficiency of evidence and harmless error is entirely consistent with a wide variety of other contexts in which the federal courts resolve questions of federal law even when it is necessary to refer to state laws, procedures and norms. For instance, federal courts determine: whether state law creates an entitlement to property or liberty protectible by the Due Process Clause; (*Vitek v. Jones*, 445 U.S. 480, 490-91 (1980); *Arnett v. Kennedy*, 416 U.S. 134, 166-67, 177-78, 210-11 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); whether Double Jeopardy bars a second prosecution for the "same offense" as defined by state law (*Brown v. Ohio*, 432 U.S. 161, 166 (1977); *Pryor v. Rose*, 724 F.2d 525, 528 (6th Cir. 1984)); whether counsel provided effective assistance, a determination potentially made in reference to prevailing local norms of professional practice (*Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Evans v. Meyer*, 742 F.2d 371, 373-74 (7th Cir. 1984)); whether state court jury instructions created a permissive or mandatory inference in the minds of the jury (*Francis v. Franklin*, 471 U.S. 307, 85 L.Ed.2d 344, 354 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979)); whether evidence wrongfully withheld by the government in a criminal prosecution is material to state court convictions (*Chaney v. Brown*, 730 F.2d 1334, 1341 n.10, 1349 (10th Cir. 1984)); whether the state court's failure to vindicate a defendant's constitutional rights is supported by an independent and adequate state ground (*James v. Kentucky*, 466 U.S. 341 (1984); *Barr v. Columbia*, 378 U.S. 146, 149 (1964)); and whether there are state remedies available to be exhausted before the federal court will consider a habeas petition (28 U.S.C. § 2254(b) & (c); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).

cable from enforcement of federal constitutional guarantees; it is also consistent with sound judicial policy.

Harmless error inquiry depends upon a host of factors "all [of which are] readily accessible to reviewing courts." *Delaware v. Van Arsdall*, 475 U.S.____, 106 S.Ct. 1431, 89 L.Ed.2d 674, 686 (1986). This is particularly true with respect to the determination whether the trial evidence was sufficient to warrant a lesser offense instruction, since that determination is based solely on review of the trial record. The state appellate court's ruling on such an issue is not based upon credibility determinations or findings of historical fact which underlie the presumption of correctness under 28 U.S.C. § 2254(d). *See Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963). It turns merely upon review of the trial record, much like review of a directed verdict or judgment notwithstanding the verdict. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure*, §§ 2574 & 2536 (1971). The federal courts on habeas review are well equipped to make that assessment.[4] The judgment exercised by the Court of Appeals in this case was well within the realm of traditional judicial experience of determining whether there was enough evidence at trial to go to the jury.

B. Independent federal review of the sufficiency of the evidence under *Beck*, whether measured against state or federal standards, does not offend principles of federalism for several reasons. First, *Beck* has been applied by this Court only to capital cases. Second, in contrast to *Jackson v. Virginia, supra*, 443 U.S. 307, review under *Beck* does not entail a "second appeal" or second guessing of findings made by the state trier of fact. Review is limited to an assessment of the trial record to determine whether the jury was wrongfully deprived of the choice of a lesser-included offense in capital cases. Third, unlike *Jackson v. Virginia*, the potential for review under *Beck* does not obtain in every criminal case or even every capital case; it applies only to

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[4] This is particularly true where, as here, that determination did not turn on any nuances peculiar to state law—Arizona and federal law are identical in all relevant respects.

the relatively rare instance in which the state trial court fails to give a lesser-included offense instruction in a capital case.[5]

C. Finally, even if it is assumed a state court's determination that the evidence did not warrant a second degree murder instruction is entitled to a "presumption of correctness" such as that under 28 U.S.C. § 2254(d), any such presumption cannot be sustained in this case for two reasons. First, it was not fairly supported by the record. Second, the reasoning of the Arizona Supreme Court in reaching its conclusion was constitutionally defective.

As previously discussed, there was abundant trial evidence of Respondent's mental disorders and propensity for impulsive violence upon which a jury could have based a verdict of second degree murder. The Arizona Supreme Court's rejection of Respondent's claim under *Beck* failed fully and logically to account for this evidence. The court reasoned that the fact that Respondent fashioned a garrote to strangle the victim and after causing the death, stabbed and mutilated the body implied Respondent had "the opportunity to reflect or premeditate." *State v. Vickers*,

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[5] Since *Beck* was decided, there have been only 10 published decisions of lower federal courts which reviewed a challenge to the sufficiency of the trial evidence in a capital case. *See Aldrich v. Wainwright*, 777 F.2d 630, 637 (11th Cir. 1985); *Miller v. Stagner*, 757 F.2d 988 (9th Cir. 1985) ____ U.S. ____, *amended*, 768 F.2d 1090, 1091 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1269 (1986); *Briley v. Bass*, 742 F.2d 155, 165 (4th Cir. 1984); *Bell v. Watkins*, 692 F.2d 999, 1004 (5th Cir. 1982), *cert. denied*, 464 U.S. 843 (1983); *Johnson v. Thigpen*, 623 F.Supp. 1121, 1131 (S.D. Miss. 1985); *Ritter v. Smith*, 568 F.Supp. 1499, 1503 (S.D. Ala. 1983), *modified*, 726 F.2d 1505 (11th Cir. 1984), *cert. denied*, 469 U.S. 869, 105 S.Ct. 218 (1984); *Jones v. Thigpen*, 555 F.Supp. 870, 876 (S.D. Miss, 1983), *modified*, 741 F.2d 805 (5th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1172 (1986); *Dobbert v. Strickland*, 532 F.Supp. 545, 558 (M.D. Fla. 1982), *aff'd*, 718 F.2d 1518 (11th Cir. 1983), *cert. denied*, 468 U.S. 1220 (1984); *United States ex rel. Brode v. Hilton*, 496 F.Supp. 619, 622 (D.C.N.J. 1980). Of these, only *one* (the case at bar) has reversed on the basis that there was sufficient evidence to mandate a lesser offense instruction under *Beck*. All others affirmed the conviction after reviewing the evidence.

129 Ariz. 506, 633 P.2d 315, 322 (1981). From this, the court concluded Respondent must have *actually* premeditated. Therein lies the flaw of the court's syllogism. The fact that Respondent may have had an "opportunity" to reflect and premeditate does *not* mean that he necessarily *did*, and the jury was free to find otherwise, particularly in view of the substantial evidence of Respondent's impulsive character. *See Fisher v. United States*, *supra*, 328 U.S. at 469-70 n.3; *LaFave* and *Scott*, *supra*, at p. 563. Thus, the state court's ruling was not "fairly supported by the record." 28 U.S.C. § 2254(d)(8).

Second, the Arizona Supreme Court's conclusive presumption of premeditation from the mere "opportunity" to premeditate is unconstitutional. The court's reasoning in affirming the trial court's failure to submit a second degree murder instruction to the jury had the net effect of directing a verdict of first degree murder, removing the issue of Respondent's state of mind from the jury, and relieving the state of its burden of proving premeditation beyond a reasonable doubt. Such a conclusive presumption violates rudimentary due process principles established in *Mullaney v. Wilbur*, 421 U.S. 684, 699-701 (1975), *Sandstrom v. Montana*, 442 U.S. 510, 521-24 (1979), and *In re Winship*, 397 U.S. 358 (1970). Indeed, the effect of *conclusively* presuming premeditation from the mere opportunity to premeditate is even more offensive to due process than the rebuttable inference condemned in *Sandstrom*.[6] Any presumption of correctness that might otherwise attach to the Arizona Supreme Court's conclusion that a second degree murder instruction was not warranted was completely undermined by the illogic and unconstitutionality of its reasoning.

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[6] The Arizona Supreme Court's rationale is also constitutionally suspect because there is no rational basis for the presumption. It cannot be said that the fact of premeditation "is more likely than not to flow from" the mere opportunity to premeditate, particularly where the defendant, like Respondent, is given to reflexive and impulsive acts of violence. *Leary v. United States*, 395 U.S. 6, 36 (1969). *See County Court of Ulster County v. Allen*, 442 U.S. 140, 165 (1979).

Accordingly, this is not the proper case to determine how much, if any, deference should be given to the state court's assessment of the sufficiency of the evidence under *Beck* and *Hopper* since under any standard, the assessment was clearly wrong in this case.

CONCLUSION

This Petition does not present issues worthy of the Writ. There is no conflict among the circuits to resolve. Nor are there important constitutional questions of national significance that need be addressed. This case does not involve the constitutionality of the state laws defining substantive elements of a crime or the standard of proof as it relates to submission of lesser offense instructions to the jury. Nor does it involve any significant question of federalism. It only involves the application of clear standards, identical under both state and federal law, to the unique facts of this individual case.

This is not a proper case to determine the precise measure of deference, if any, which should be accorded to a state court determination that the evidence was not sufficient under *Beck* and *Hopper* to warrant a lesser offense instruction. Under any standard, even the presumption of correctness under 28 U.S.C. § 2254(d), the determination by the state court in this case was clearly erroneous. The trial record carefully reviewed by the Court of Appeal below contained more than enough evidence to permit the jury to consider a verdict of second degree murder.

Finally, this Court should deny the Writ in the interests of justice and judicial economy. As noted *supra*, the Court of Appeal found that Respondent raised other substantial questions. Reversal of the Court of Appeals' decision will likely lead either to grant of habeas corpus on other grounds or remand to the District Court for an evidentiary hearing. Rather than prolonging adjudication in the federal court of the numerous substantial issues raised by Respondent's habeas petition, it would be far more expeditious and efficient to deny certiorari and cause Respondent to be retried in the state court on the merits within a reasonable period of time.

For all of the foregoing reasons, the Writ should be denied.

Dated: December 19, 1986

Respectfully submitted,

CHARLES R. BREYER*
JOSEPH C. SPERO
COBLENTZ, CAHEN, MCCABE
& BREYER

JOHN P. FRANK
LEWIS & ROCA

MARGARET C. CROSBY
ALAN L. SCHLOSSER
EDWARD M. CHEN

Attorneys for Respondent
**Counsel of Record*